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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/697,608

10/30/2003

Stephen Roy Barrow

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EXAMINER

RAMACHANDRAN, UMAMAHESWARI

ART UNIT

PAPER NUMBER

1617

MAIL DATE

DELIVERY MODE

06/27/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/697,608	<b>Applicant(s)</b> BARROW ET AL.	
	<b>Examiner</b> Umamaheswari Ramachandran	<b>Art Unit</b> 1617	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 30 May 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1,2 and 7-15 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2 and 7-15 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on May 30 2007 has been entered.

Claim 1 has been amended and claims 3-6 has been cancelled. Claims 1, 2, 7-15 are currently pending.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2, 7-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Muller et al (U.S. 6,248,338) in view of Whistler et al. (U.S. 5,453,281) and further in view of Mausner et al (U.S. 5,215,759) and further in view of Franklin et al. (U.S. 2001/0055574).

Muller et al. teaches a composition for skin care comprising glycerin, modified starch (hydroxypropyl di-starch phosphate), and a surfactant (Col.24, 25, see claims 3, 10 and 20). The reference teaches that the gel composition preferably contains one or

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more monohydric or polyhydric alcohol such as glycerin and is present in a quantity of about 5 to 25% in weight (col. 8, lines 1-6).

The reference does not teach a non-gelatinized modified starch in the composition.

Whister et al. teaches a cosmetic composition with un-gelatinized, small starch granules to provide enhanced coverage and a softer feel when applied to the skin (see Abstract). The reference teaches that small granule starches can be used with or without additional modification in the preparation of the improved tableting and cosmetic/dusting powder compositions and is non-gelatinized in character to maintain the functional use (col. 3, lines 64-67).

Muller and Whister do not teach the crystalline gel structurant in the cosmetic composition.

Mausner et al. teaches a cosmetic composition comprising glycerin (20-40% of 0.5% to about 3% of hydrophilic microcapsule), PEG-100 stearate (40-60% of 11.5-15.5% of a complex of glyceryl stearate), octyldodecanol, a fatty alcohol (60-80% of 0.5% to about 3% of lipophilic microcapsule), 0.05-0.15% of glyceryl ester complex (glyceryl linoleate, glyceryl linolenate, and glyceryl arachidonate) and at least one long-chain saturated fatty acid (1-5% of 0.5% to about 3% of lipophilic microcapsule) selected from the group consisting of palmitic acid, stearic acid etc. (col. 4, lines 17-33). The composition taught by Mausner works out to the following ranges: 4.6-9.3% of PEG-100 stearate surfactant, 0.3-2.4% of fatty alcohol, 0.05-0.15% glyceryl ester,

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0.005-0.15% fatty acid and the co-surfactant total ranges from 0.35-0.15%. The surfactant and the co-surfactant fall in the range of 69:40.

The reference does not teach the surfactant and co-surfactant being present in the range between 15:85 and 60:40.

It would have been obvious to one of ordinary skill in the art at the time of the invention to have the surfactant and co-surfactant being present in the range between 15:85 and 60:40 in a cosmetic composition comprising glycerin and non-gelatinized modified starch. Mausner teaches a cosmetic composition comprising glycerin and the surfactants and co-surfactants in the range of 69:40. One of ordinary skill in the art would have been motivated to add surfactant and co-surfactant in the range between 15:85 and 60:40 in a cosmetic composition to achieve improved cosmetic functionalities as taught by Mausner and it is within the skill of the art to routinely optimize the quantities of the surfactants and co-surfactants to improve and achieve desired results.

The reference does not teach a crystalline gel structurant comprising a surfactant and a co-surfactant in an amount and type exhibiting an enthalpy as measured by Differential Scanning Calorimetry ranging from about 2 to about 15 Joules per gram and a normal force of from about 0.5 to 5 grams as recited in claim 1 and the melting point range of the gel structurant (claim 9).

Franklin et al. teaches a cosmetic composition that is a structured emulsion (see Abstract). The reference teaches that it is desirable to provide a structurant having an enthalpy of gelation that facilitates processing at conveniently accessible temperatures and promotes stability (see Abstract) and the enthalpy can be determined by differential

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scanning calorimetry (para 0027). Franklin et al. provides examples of the enthalpies of gelation obtained for different structurants in different solvents and in different amounts (pl 1, example 1), illustrating that different enthalpies are achieved in relation to the chemical composition and content of the structurant, as well as in relation to the nature of the solvent used. The reference further teaches that the hardness (in N/mm<sup>2</sup>, a measure of the force) and penetration depth of the composition can be measured and vary according to the type of structurant and solvent system used (examples 5 and 6). In regards to claim 9 the reference provides examples (tables p 13) of how the gelling temperature varies according to the type of structure/solvent system.

It would have been obvious to one of ordinary skill in the art at the time the claimed invention was made to combine glycerin, non-gelatinized modified starch as a cosmetic composition. The motivation to do is provided by Muller et al, Whister et al. and Franklin et al. Muller et al. teaches that starch acts as a skin feel improving agent, stability improver, a viscosity regulator, and as a co-emulsifier (see Abstract). Whistler et al. teaches that small granular non-gelatinized starches provide compositions having enhanced functionality and sensory (smoothness) characteristics. Franklin et al. teaches that the amount and type of gelling agent and solvent can be varied to achieve a desired enthalpy of gelation, such as enthalpy that facilitates processing at conveniently accessible temperatures and that promotes stability.

It is noted that "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." In re Aller, 220 F.2d 454,456, 105 USPQ 233, 235 (CCPA 1955);

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Furthermore, with regards to the force, melting temperature and SkiCon value (claim 8), it is noted that since the combined teachings of Muller et al, Franklin et al, and Mausner et al. render the composition obvious, the property of such a claimed composition will also be rendered obvious by the prior teachings, since the properties, namely the normal force, melting temperature and SkiCon value are inseparable from its composition. Therefore, if the prior art teaches the cosmetic composition or renders the cosmetic composition obvious, then the properties are also taught or rendered obvious by the prior art.

The examiner respectfully points out "Products of identical chemical composition can not have mutually exclusive properties: "A chemical composition and its properties are inseparable. Therefore, if the prior art' teaches the identical chemical structure, the properties applicant discloses and/or claims are necessarily present. In re Spada, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).

The examiner respectfully points out the following from MPEP § 2112.01: "[T]he discovery of a previously unappreciated property of a prior art composition, or of a scientific explanation for the prior art's functioning, does not render the old composition patentably new to the discoverer." Atlas Powder Co. v. Ireco Inc., 190 F.3d 1342, 1347, 51 USPQ2d 1943, 1947 (Fed. Cir. 1999). Thus the claiming of a new use, new function or unknown property, which is inherently present in the prior art, does not necessarily make the claim patentable. In re Best, 562 F.2d 1252, 1254, 195 USPQ 430,433 (CCPA 1977).

***Response to Arguments***

Applicants' argue that they have achieved compositions with significant glycerin content through formulation with a modified starch in combination with a specified crystalline gel structurant. Muller et al. teaches a composition for skin care comprising glycerin and starch (hydroxypropyl di-starch phosphate), and a surfactant. The reference teaches that in a preferred embodiment, the composition is in the form of high viscosity gel and the gel preferably contains one or more monohydric or polyhydric alcohols with particular preference being given to glycerin and is preferably present in a quantity of about 5 to 25 % by weight. The reference further teaches that the quantity should not be exceeded by 25% because the starch can precipitate (col. 8, lines 1-9). The reference teaches in example 16, (dental cream) glycerin in an amount of 15% and in other examples less than 10% of glycerin but it clearly teaches that in preferred embodiments the gel composition can have glycerin up to 25%.

Applicants' argue that Franklin does not remedy the deficiencies of Mausner and Muller and does not disclose modified starches or crystalline gel structurant with surfactant and co-surfactant. In response, Franklin has been used to show that different enthalpies are achieved in relation to the chemical composition and content of the structurant, as well as in relation to the nature of the solvent used. Hence it would have been obvious to one of ordinary skill in the art at the time of the invention to routinely optimize the amount and type of gelling agent and solvent to achieve a desired enthalpy of gelation, to facilitate processing and to promote stability.



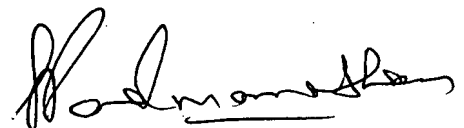
**Conclusion**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Umamaheswari Ramachandran whose telephone number is 571-272-9926. The examiner can normally be reached on M-F 8:30 AM - 5:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan can be reached on 571-272-0629. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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